Supreme Court, U.S.
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(2)

No. 02-850

In the

Supreme Court of the United States

RANCHO LOBO, LTD.,

Petitioner,

v.

ANTONIO DEVARGAS, PATRICIO ANTONIO GARCIA, GILBERT CHAVEZ, MOISES MORALES, ALFREDO MONTOYA, NELSON CORDOVA, in their Individual and Official capacities, and THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF RIO ARRIBA,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Court of Appeals correctly applied New Mexico state law of preemption in holding that a county timber harvest ordinance, which was otherwise within the proper scope of county zoning under New Mexico state law, was not preempted by less restrictive state law concerning forestry.

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STATUTORY PROVISIONS OMITTED FROM PETITION

The Petition fails to mention the New Mexico statutes providing for county zoning power. N.M. Stat. Ann. §§ 3-21-1 to 3-21-14, 4-37-1 (1978).

MISSTATEMENTS OF FACT AND LAW IN PETITION

Petitioner's statement of the case contains misleading and argumentative statements and characterizations of fact. The first is Petitioner's characterization of the Tenth Circuit as having "intervened on behalf of a local New Mexico county timber harvesting ordinance." Petition at 3. In fact, Petitioner chose to pursue its state law claims through the federal courts, and the Tenth Circuit's routine application of New Mexico state law on appeal cannot accurately be characterized as a form of "intervention." Indeed, the Tenth Circuit's decision below contains nothing more than the straightforward resolution of pure questions of law.

Petitioner also mischaracterizes the New Mexico Forest Conservation Act as "specifically insur[ing] the preservation of clear cutting." *Id.* Such an aggressive construction of that statute is belied by the language of the statute itself, which merely provides that the statute itself does not "prevent" a landowner from clear cutting. See N.M. Stat. Ann. § 68-2-16 (1978). The Act does not guarantee or affirmatively provide a right to clear cut. This is precisely what the Tenth Circuit properly held. 303 F.3d 1195, 1205 (10th Cir. 2002); Petition, Appendix B at 20a-21a.

Respondents also dispute Petitioner's assertion that, at oral argument, the Tenth Circuit panel expressed concern over the State Forestry Division's authority. Petition at 5. In fact, the panel expressed a clear understanding that the preemption question before them was a pure question of law and that Petitioner's numerous questionable assertions about the Forestry Division's concerns were irrelevant to the resolution of that legal issue.

Respondents also urge the Court not to accept Petitioner's self-serving characterizations of the Tenth Circuit's holding and reasoning. The decision below speaks for itself.

REASONS FOR DENYING THE WRIT

The appeal in this diversity case dealt with two straightforward issues of New Mexico state law: (1) whether Rio Arriba County's Timber Harvest Ordinance is preempted by the New Mexico state law concerning forestry; and (2) whether the Timber Harvest Ordinance violates New Mexico law by vesting the County's planning department with unguided discretion. The District Court had answered both questions in the affirmative.

After reviewing and applying the New Mexico statutory and decisional law pertinent to these two issues, the Tenth Circuit reversed the District Court on both points. *Rancho Lobo, Ltd. v. DeVargas*, 303 F.3d 1195 (10th Cir. 2002). Petitioner seeks review from this Court only as to the Tenth's Circuit ruling on preemption. For the reasons set forth below, the Court should deny Petitioner's request.

I. The Writ Should Be Denied Because Petitioner Has Failed to Establish Any Compelling Reason under Supreme Court Rule 10

First, Petitioner has failed to articulate any compelling reason why this Court should issue a writ of certiorari in this case, as required by Supreme Court Rule 10. Pursuant to that rule "[a] petition for a writ of certiorari will be granted only for compelling reasons" and "is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." S. Ct. R. 10. The types of issues that merit review on a writ of certiorari generally consist of: conflicts between federal courts of appeals; decisions by a federal court that so far depart from the accepted and usual course of judicial proceedings that the Supreme Court feels it must exercise its supervisory power; decisions of important federal questions by a federal court of appeals or a state court of last resort that conflict with decisions of another federal court of appeals, a state court of last resort, or the Supreme Court; or a state court or federal court of appeals decision of an important question of federal law that should be settled by the Supreme Court. *See* S. Ct. R. 10(a)-(c).

The Tenth Circuit's decision below did not create any conflict between itself and any other federal courts of appeal or state court of last resort, and Petitioner does not contend that it did. Because it dealt only with New Mexico state law questions under diversity jurisdiction, the Tenth Circuit's decision below also did not raise or address any important question of federal law that should be settled by this Court.

For the most part, Petitioner's argument for granting a writ of certiorari amounts to nothing more than a claim that the Tenth Circuit applied state law incorrectly. As explained below, Petitioner's argument that the Tenth Circuit misapplied New Mexico law of preemption is wrong. But even were Petitioner correct about the state law question, and the Tenth Circuit wrong, that would not be the sort of error that warrants review by this Court on a writ of certiorari. S. Ct. Rule 10.

The closest Petitioner comes to articulating the type of compelling reason required for a writ of certiorari is Petitioner's contention that the Tenth Circuit violated proper judicial procedure by applying state law instead of certifying the preemption issue to the New Mexico Supreme Court. As explained below, however, that argument is without merit.

II. The Writ Should Be Denied Because this Is a Routine Diversity Jurisdiction Case in Which the Tenth Circuit Properly Applied the New Mexico State Law of Preemption

The law of New Mexico as articulated in decisions of the New Mexico State Supreme Court and Court of Appeals is clear and well-established enough to allow the Tenth Circuit to resolve the state law questions raised on appeal in this case. As explained in the Court of Appeals' decision and Respondents' briefs below, the New Mexico Supreme Court has enunciated coherent general rules and principles regarding the broad authority of counties and municipalities to regulate various aspects of land use and the limited circumstances in which local ordinances should be found to be preempted by, or in conflict with, state laws.

See Chapman v. Luna, 678 P.2d 687 (N.M. 1984); *Casuse v. City of Gallup*, 746 P.2d 1103 (N.M. 1987); *Board of Comm'rs of Rio Arriba County v. Graecen*, 3 P.3d 672 (N.M. 2000). These general principles have been interpreted and applied in a consistent manner by the New Mexico Court of Appeals in an unbroken line of decisions extending over more than thirty years. *See City of Hobbs v. Biswell*, 473 P.2d 917 (N.M. Ct. App.), *cert. denied*, 473 P.2d 911 (1970); *San Pedro Mining Corp. v. Board of County Comm'rs of Santa Fe County*, 909 P.2d 754 (N.M. Ct. App. 1995), *cert. denied*, 908 P.2d 750 (1996); *Gould v. Santa Fe County*, 37 P.3d 122 (N.M. Ct. App. 2001). Together the opinions of New Mexico's Supreme Court and Court of Appeals make up a clear and harmonious body of decisional law that provided ample guidance for the Tenth Circuit to properly apply the New Mexico law of preemption to the questions raised in this case.

This coherent body of New Mexico law clearly rendered the decision of the District Court below insupportable and required its reversal. It is axiomatic under New Mexico law that legislative acts, such as local government ordinances, are presumed to be legal, valid, and constitutional, and that New Mexico courts have "the duty of construing statutes, if possible, to resolve any apparent conflict." *Chapman v. Luna*, 678 P.2d at 690-91. *See also San Pedro Mining Corp. v. Board of County Comm'rs of Santa Fe County*, 909 P.2d at 758-59. It also is clear under New Mexico law, and the law of sister jurisdictions to which New Mexico courts refer for guidance, that a local ordinance may duplicate, complement, or provide for greater restrictions than a state statute, *Gould v. Santa Fe County*, 37 P.3d at 128; *San Pedro Mining*, 909 P.2d at 759-60; *City of Hobbs v. Biswell*, 473 P.2d at 921, and

that preemption or conflict between the state law and local regulation exists only where the state law and local regulation are irreconcilable, *City of Hobbs*, 473 P.2d at 920; *Cherokee Water and Sanitation District v. El Paso County*, 720 P.2d 1339, 1341 (Colo. Ct. App. 1989); *Von Lubken v. Hood River County*, 803 P.2d 750, 752 (Or. Ct. App. 1990).

Applying both the general principles and specific holdings of analogous cases from New Mexico's decisional law, the Tenth Circuit had a clear basis for deciding the pure questions of law before it and reversing the district court's erroneous construction of state law. In particular, the Court of Appeals derived guidance from the *San Pedro Mining* case, 909 P.2d 754, because that New Mexico intermediate appellate court decision is closely analogous to this case – holding that a county mining ordinance was not preempted by New Mexico's regulatory regime for mining, which is at least as comprehensive as the State's regulatory regime for forestry. *See Rancho Lobo*, 303 F.3d at 1202-05.

In a far-fetched attempt to give the issues decided below a federal patina, Petitioner embarks on a fanciful discussion of the supposed differences between federal and New Mexico preemption law and then makes the even more fanciful claim that the Tenth Circuit covertly applied federal preemption law. Petition at 8-10. There is not a shred of support for Petitioner's assertion that the Tenth Circuit erroneously applied the federal, rather than the state, law of preemption. Petitioner's assertion is especially outlandish given the fact that the Court of Appeals relied exclusively on New Mexico preemption law. Indeed, the Tenth Circuit's decision analyzes and applies only New Mexico state law, *see* 303 F.3d at 1200-1207, and its holdings closely follow and harmonize with

existing New Mexico law. Because the Tenth Circuit's decision below was correct, raises no question of federal law, and creates no conflict with any other court, there is no basis for granting a writ of certiorari in this case.

Petitioner's complaints regarding the Tenth Circuit's application of New Mexico law are especially ill-received because it was Petitioner who chose federal court as the forum for adjudication of this case. Having avoided New Mexico state court as a forum, it hardly lies in the mouth of Petitioner to argue that the federal court of appeals sitting in diversity jurisdiction was unable to apply, or ought not to have applied, New Mexico law. The fact that Rancho Lobo's petition for writ of certiorari is predicated on attacking its own forum of choice merely because it is unhappy with the outcome on appeal is reason enough to deny the petition.

III. The Tenth Circuit's Application of New Mexico Law, Rather than Certifying the Question to the State Supreme Court, Does Not Warrant the Exercise of this Court's Supervisory Power

As explained above, the Tenth Circuit thoroughly reviewed and properly applied the New Mexico state law of preemption in the decision below. Nonetheless, Petitioner argues that this Court must exercise its supervisory power because the Tenth Circuit did not certify the question of preemption to the New Mexico Supreme Court. Not only is this argument without merit, it reveals a fundamental failure to grasp the basic jurisprudential principles that guide federal courts in their exercise of diversity jurisdiction. It is in the nature

of federal diversity jurisdiction that federal courts sitting in diversity jurisdiction are called on to apply state law as a state court would. *See Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938). If, as Petitioner implies, the controlling state law in a diversity jurisdiction case could only be ruled on by the supreme court of that state, it would make an absurdity of diversity jurisdiction.

To begin with, Petitioner seems to believe that simply because the Tenth Circuit overruled the District Court on a question of state law its decision exemplifies "a pattern of circumventing modern procedures for determining novel unsettled questions of state law in diversity cases," requiring the exercise of this Court's supervisory power. Petition at 11. This contention ignores the basic rule in diversity cases that a district court's state law determinations are reviewed de novo and entitled to no deference. *Salve Regina College v. Russell*, 499 U.S. 225, 239 (1991); *Woolard v. JLG Industries, Inc.*, 210 F.3d 1158, 1168 (10th Cir. 2000). Accordingly, the Tenth Circuit's reversal of the District Court's state law determinations in this case does not in itself give rise to any inference of error, let alone "so far [a departure] from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's supervisory power." Sup. Ct. Rule 10(a).

Petitioner also maintains that the Court of Appeals could not rule on the appeal because the most closely analogous New Mexico decisions on state law preemption of local land use ordinances are from the State's intermediate appellate court, rather than the state supreme court. Under established principles of jurisprudence, however, the Tenth Circuit clearly was authorized to use the more closely on point intermediate

appellate decisions as well as state supreme court precedent to guide its application of New Mexico state law in this case.

In this case, the Tenth Circuit looked to New Mexico Supreme Court decisions that set forth the broad principles of the State's law of preemption. Because the body of decisional law from the State's supreme court is limited, the Tenth Circuit also looked to decisions of the State's court of appeals for guidance, including a state court of appeals decision that is closely on point, namely *San Pedro Mining*. As the Tenth Circuit explained, 303 F.3d at 1202 n.2, considering intermediate state appellate court decisions where there is not a state supreme court decision on point is a well-established procedure that has been uniformly applied by this Court and all federal courts of appeals sitting in diversity jurisdiction. *See Hicks ex rel. Feiock v. Feiock*, 485 U.S. 624, 630 n.3 (1988); *West v. American Telephone & Telegraph Co.*, 311 U.S. 223, 237-38 (1940); *Webco Indus., Inc. v. Thermatool Corp.*, 278 F.3d 1120, 1132 (10th Cir. 2002); *Federal Home Mortgage Corp. v. Seattle Insur. Co.*, ___ F.3d ___, 2003 WL 152738 (3d Cir. Jan 22, 2003); *McMahon v. Toto*, 311 F.3d 1077, 1080 (11th Cir. 2002); *Hermann Holdings Ltd. v. Lucent Technologies, Inc.*, 302 F.3d 552, 558 (5th Cir. 2002); *In re Watts*, 298 F.3d 1077, 1082-83 (9th Cir. 2002); *Gibbs-Alfano v. Burton*, 281 F.3d 12, 18-19 (2d Cir. 2002). In the face of this overwhelming precedent, Petitioner's argument that the Tenth Circuit's approach in this case deviated impermissibly from acceptable judicial norms is simply untenable.

IV. The Writ Should Be Denied Because the Tenth Circuit's Decision Has Not Created Any Crisis or Widespread Problem in New Mexico

Petitioner's contention that the Tenth Circuit's decision in this case has created a "major crisis" in New Mexico is unfounded. In support of this contention, Petitioner attempts to make much of an amicus curiae brief filed by the former governor of New Mexico in support of Petitioner's petition for rehearing en banc. In fact, there is no evidence to support Petitioner's self-serving claim of a crisis, and it would not be reasonable to infer a crisis from the former governor's brief. Indeed, for a number of reasons the former governor's brief has virtually no persuasive weight.

First, under New Mexico law the attorney general, not the governor, is the proper representative of the State in judicial proceedings. N.M. Stat. Ann. § 8-5-2 (1978). Were there an actual crisis, or even a genuine problem, one would expect the attorney general to have interceded in this case on behalf of the State long ago, but the attorney general has never sought to participate in this case at all. Second, the current governor of New Mexico has not adopted or endorsed the former governor's political position on the County's Ordinance. The fact that neither the attorney general nor the current governor seems to have noticed the "major crisis" that Petitioner claims was created by the Tenth Circuit's decision, or to have shown any concern over that decision, calls into question the credibility of the Petitioner's and the former governor's claim that the Tenth Circuit's decision is problematic from the State's

point of view.[1]

Even the former governor's belated amicus brief offered nothing more than speculation that the County's Ordinance *could* create some inconvenience to State Forestry Division officials in administering their wildfire prevention efforts, and the assertion that the possibility of such difficulties is of concern due to existing drought conditions. Petitioner repeatedly refers to the argumentative opinions in the former governor's brief as if they were evidence of a crisis concerning New Mexico's forest management and prevention of fires. *See* Petition at 10-12. Not only are the former governor's arguments not evidence, but, like Petitioner's own assertions, they are not supported by any evidence that the Timber Harvest Ordinance has resulted in any *actual* conflict with or inconvenience to the State Forestry Division's fire prevention efforts.

The speculative concerns advanced in Petitioner's briefs, and the former governor's belated amicus brief, are further belied by the fact that, despite being aware of the Timber Harvest Ordinance, the State Forestry Division expressed no opposition to, or concern with, the Ordinance when it was being

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[1] Ironically, Petitioner concedes that "[u]nder ordinary circumstances, this appeal could be dismissed" as not meriting review on certiorari. Petition at 10. Yet the only "extraordinary" circumstances Petitioner offers in support of its argument that this case is worthy of review are current drought conditions and a claim that the County "chose to make their stand" (i.e., adopt the Timber Harvest Ordinance) "in the same year as the Cerro Grande fire." *Id.* Not only are these circumstances irrelevant to the issue of preemption, the latter also is factually inaccurate. Rio Arriba County adopted its Timber Harvest Ordinance in 1998. The Cerro Grande fire did not occur until 2000.

considered and adopted by the County. Accordingly, in addition to being irrelevant to the question of whether state law preempts the County's Timber Harvest Ordinance, the Petitioner's and former governor's claims of potential difficulty arising from the Ordinance are not credible.

Rather than a real crisis, then, concern over the Timber Harvest Ordinance appears to be a topic of political debate in New Mexico. Fortunately, there is no need, or call, for the Court to wade into state politics. Under New Mexico law the determination of preemption or conflict between state law and local regulation is a matter of statutory construction, a pure question of law, and therefore an exclusively judicial function. *Board of Comm'rs of Rio Arriba County v. Graecen*, 3 P.3d at 674; *cf. Woodworker's Supply, Inc. v. Principal Mut. Life Ins. Co.*, 170 F.3d 985, 989 (10th Cir. 1999) (same under federal law). Thus, as the Tenth Circuit panel noted at oral argument, the opinions or concerns of officials in the executive branch of state government regarding the County's Timber Harvest Ordinance are irrelevant to the judicial task of resolving the issue of preemption, which is a pure question of law. The proper forum in which to address such political arguments is the state legislature, not the courts.

CONCLUSION

For all of the foregoing reasons, Respondents respectfully request that this Honorable Court deny the petition for writ of certiorari.

Respectfully submitted,

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